A **WAN MUHAMAD IBRISAM WAN IBRAHIM & ORS**

v.

OPAL PYRAMID SDN BHD

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
RAUS SHARIF JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-03-107-07]
C 2 JULY 2008

CIVIL PROCEDURE: *Costs - Security for costs - Plaintiff's ability to pay costs if defendant successful - Whether credible testimony shown - Whether likelihood of winning a consideration to be taken into account - Companies Act 1965, s. 351*

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The learned judge allowed the respondent's appeal against the decision of the senior assistant registrar ('SAR') who allowed the appellants' application for security of costs in the sum of RM75,000 against the respondent. Hence, the appellants' appeal
E against the decision of the learned judge.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

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(1) The authorities have established that the concept of likelihood of winning had no place at all in an application for security for costs. The prerequisite is that there should be credible testimony before the judge and there is reason to believe that
G the plaintiff will be unable to pay the costs of the defendants if they are successful in defence. The discretion ought not to be hampered by any new formulated concepts that tend to import constraint demands into s. 351 of the Companies Act 1965. (para 18)

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(2) The learned judge had openly admitted that the respondent was a company that did not carry a large asset. He fell short of admitting that the respondent, a dormant RM2 company was impecunious. In fact that shell company which had no
I business address and no assets suffered liabilities of up to RM3,401. Apart from the present appeal, where the panel had ordered costs, there were earlier High Court orders dismissing

the respondent's application with costs for interlocutory injunctions against the appellants. Two other interlocutory applications were also made by the respondent and eventually dismissed with costs – and all that without taking into account the costs from the impending full-blown trial and any probable follow up appeals. (para 20)

(3) The respondent would certainly fail to pay up if costs were ordered against it. The learned judge also failed to consider the relevant factors that were irrebuttable of its inability to pay the appellants in the event of the suit's dismissal. Unless security for costs were ordered against the respondent, the stifling oppression would shift to the appellants. (para 21)

[Deposit refunded to appellant. SAR's order reinstated but varied to RM40,000.]

Bahasa Malaysia *Translation Of Headnotes*

Yang arif hakim telah membenarkan rayuan responden terhadap keputusan Penolong Kanan Pendaftar ('SAR') membenarkan permohonan perayu untuk jaminan kos terhadap responden berjumlah RM75,000. Ini adalah rayuan perayu terhadap keputusan yang arif hakim.

Diputuskan (membenarkan rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Autoriti-autoriti telah memutuskan bahawa konsep kemungkinan akan menang tidak mempunyai tempat dalam suatu permohonan untuk jaminan kos. Syaratnya adalah bahawa harus wujud di hadapan hakim testimoni yang boleh dipercayai dan wujud alasan untuk mempercayai bahawa plaintif tidak mampu membayar kos defendan jika defendan berjaya dalam pembelaannya. Budibicara ini tidak harus terjejas oleh mana-mana penggubalan konsep baru yang mengenakan tuntutan-tuntutan sekatan ke dalam s. 351 Akta Syarikat 1965.

(2) Yang arif hakim secara terbuka mengakui bahawa responden adalah sebuah syarikat yang tidak mempunyai aset yang banyak. Apa yang tidak dinyatakan beliau adalah bahawa responden adalah sebuah syarikat RM2 yang tidak aktif dan papa kedana. Malah, syarikat kerangka yang tidak mempunyai

A apa-apa aset mahupun alamat perniagaan ini telah menanggung liabiliti sehingga RM3,401. Selain dari rayuan semasa, di mana panel telah memerintahkan kos, terdapat juga perintah-perintah Mahkamah Tinggi lain yang menolak permohonan injunksi interlokutori responden terhadap perayu dengan kos. Dua
B permohonan interlokutori lain juga dibuat oleh responden yang akhirnya ditolak dengan kos – dan semua ini tanpa mengambilkira kos-kos yang berbangkit dari perbicaraan penuh di sini serta rayuan-rayuan yang berkemungkinan menyusul nanti.

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(3) Responden pasti tidak akan mempu membayar jika kos diperintahkan terhadapnya. Yang arif hakim juga gagal menimbangkan faktor-faktor relevan tidak tersangkal berhubung ketidakupayaan responden untuk membayar perayu sekiranya
D guaman ditolak. Perayu pastinya akan teraniaya kecuali jaminan untuk kos diperintahkan terhadap responden.

[Deposit dikembalikan kepada perayu. Perintah SAR dikekalkan tetapi dipinda kepada RM40,000.]

E **Case(s) referred to:**
Kevorkian v. Burney (No 2) [1937] 4 All ER 468 ***(refd)***
Pearson and Another v. Naydler and Others [1977] 3 All ER 531 ***(refd)***
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***
Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(refd)***
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Legislation referred to:
Companies Act 1965, ss. 176, 351
Courts of Judicature Act 1964, ss. 44

G Companies Act 1948 [UK], s. 447

Other source(s) referred to:
GF Harwood, *Odgers on Pleading and Practice,* p 266

For the appellants - Adam Abdullah (S Maniarasan with him); M/s Adam Abdullah & Mani
H
For the respondent - JT Sambathan; M/s Joshua Sambathan & Assoc

[Appeal from High Court, Kuala Lumpur; Suit No: D8-22-981-2005]

Reported by Usha Thiagarajah

I

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appeal before us was allowed with costs whereupon the High Court's decision was set aside. Pursuant to this order the senior assistant registrar's order allowing the first to the fourth defendants' (hereinafter merely referred to as the appellants) application for security for costs was reinstated. The only difference was that the sum of RM75,000 was varied to RM40,000.

[2] We now touch on the background of this appeal. The plaintiff (hereinafter referred to as the respondent) had sued Wan Muhamad Ibrisam bin Wan Ibrahim, Tuan Haji Mohd Salleh bin Zakaria, Said @ Shuaib bin Bakar, Salwan Corporation Berhad and Sateras Resources (Malaysia) Berhad (respectively the first until fifth defendants) for a breach of contract. On 24 August 2005, the four appellants with the exception of the fifth defendant (hereinafter referred to as Sateras), pending the main suit, filed a summons-in-chambers seeking security for cost for the sum of RM75,000 against the respondent. As said above, before the senior assistant registrar, the appellants succeeded and the full sum of RM75,000 sought for was granted as security for costs. Dissatisfied with that order, the respondent appealed to the judge-in-chambers and on 6 June 2007 successfully overturned the earlier order. It was then the turn of the appellants to appeal to the Court of Appeal hence our involvement.

[3] To appreciate the matter more comprehensively, a need arises for us to lay down the antecedents as well as the factual matrix of this case. Sateras was undergoing a restructuring scheme under s. 176 of the Companies Act 1965. In a word it was classified as a PN4 company by Bursa Malaysia. Prior to this suit the fourth appellant had entered into a Definitive Agreement dated 9 May 2003, wherein on completion of the restructure of Sateras, it was supposed to be taken over by the fourth appellant. In anticipation of the take over exercise between the fourth appellant and Sateras, the respondent was established on 15 April 2003. As provided for in the agreement, Sateras would become the wholly owned company of the fourth appellant, thereafter followed up by a disposal of Sateras to the respondent for RM1. The respondent, which was a dormant company with a paid-up capital of RM2,

thus was merely created as a Special Purpose Vehicle ("SPV") to facilitate the takeover exercise. From these facts so far adduced, without prejudging the matter conclusively, in the event the scheme of restructure were to fail the Definitive Agreement would be functionless and the respondent redundant. The learned judge had not missed this point regarding the function factor and the respondent's poverty when he said:

> It is clear that all the defendants knew right from the start that the plaintiff was a company which was set up for a purpose of taking over the business of the 5th defendant in the event that the Section 176 scheme of arrangement was successful. A company of this nature is not expected to carry a large asset – its principal objective being merely to take over the 5th defendant business.

[4] The following facts were not denied in that the restructure scheme failed when the Sateras' petition to have the scheme approved was dismissed by the High Court on 31 January 2005. The appeal to the Court of Appeal was also struck out on 15 June 2005. Leave was also applied for in order to appeal to the Federal Court but was unanimously dismissed on 26 September 2005. As a consequence of this failure to obtain the sanction by 31 March 2005, the appellants terminated the Definitive Agreement on 1 April 2005.

[5] This termination of the Definitive Agreement did not go down too well with Sateras, and it filed a suit ie, D6-22-465-2005 and *ex parte* interlocutory injunctions against the appellants, purposefully to restrain the termination of the Definitive Agreement. On 1 August 2005 the *ex parte* injunctions were dissolved and the *inter partes* applications were dismissed with costs. On 11 July 2005 it was the turn of the respondent to file this suit ie, D8-22-981-2005. It even applied for interlocutory injunctions against the appellants in similar terms as in D6-22-465-2005 but likewise failed on 21 September 2005.

[6] The respondent's main contention in taking up the principal action against the appellants, amongst others included the plea that the notice of termination issued by the 4th appellant's solicitor was unlawful, void and premature. It alleged that it should not have been issued by the fourth appellant's solicitor, Messrs Adam Abdullah & Mani, as one of their partners ie, S.Maniarasan at the material date of its issuance was a director in the fourth

appellant company and also a major shareholder in Sateras. In a nutshell, with the existence of that conflict of interest, the firm should have discharged itself from representing all four appellants.

[7] The appellants had contended in the statement of defence that the respondent's claim was not *bona fide*, and was doomed to fail, let alone the issues raised were identical with the issues raised in suit no.D6-22-465-2005 commenced by Sateras against the appellants. As stated above in that suit Sateras had failed in its action. Further, the respondent, indisputably a dormant private limited company, with a paid up capital of RM2 was without *locus standi* to take up the matter. I could not help but observe that the Definitive Agreement was only between Sateras and the fourth appellant, with the respondent a mere term in the agreement.

[8] We now touch on the relevant portions of the learned judge's grounds. He had openly admitted that the respondent was set up for the purpose of taking over the business of Sateras after sanction was obtained. He agreed too that a company of this nature was not expected to carry a large asset. He opined that the failure to obtain sanction, despite the highest court in the land having confirmed the High Court's refusal, was of no impediment to the suit. It was merely an element in the equation and would not necessarily be the factor that would determine the respondent's claim. The success of the suit should be determined by perusing the four corners of the agreement and thereon decide whether the termination was lawful or otherwise.

[9] The learned judge thenceforth had made the following remarks when he stated:

> **A party** applying for security should be allowed to succeed **only** if on a scrutiny of his opponent's case as a whole it can **reasonably be concluded the claim** is so weak that the **likelihood of failure** is predictable; and if allowed to proceed for trial would cause the applicant to lose on costs which he may not be able to recover.

[10] The above statement certainly is so far removed from the legislated ingredients of s. 351 of the Companies Act 1965 which confines applicants to defendants. Only when the latter has filed a counter-claim may a plaintiff allude to this section. For other situations, say in an appeal to the Court of Appeal, under s. 44 of the Courts of Judicature Act 1964 to prevent injustice, the

court may order security for costs against a party, pending the disposal of the matter before it. The selective precondition of s. 351 is not found in s. 44 of the Courts of Judicature Act 1964.

[11] Further, the learned judge reasoned that security for costs should be allowed if it can reasonably be concluded that the claim is so weak that the likelihood of failure is predictable. To do that the judge will have to go through the processes of some preliminary hearing on the plaintiff's case; if it were so weak the plaintiff's case should be struck out. As the learned judge had said "only" surely it is mandated that the judge must sift the evidence. Interestingly enough, he failed to do that here, in order to gauge the strength of the plaintiff's case. Lastly it gives the impression that only if the plaintiff's case were doomed to failure would security for costs be given. Any other reason will be unacceptable in an application of this nature. Even the assertion that the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal in the country will not be good ground to grant security for costs. Surely the views of the learned judge have militated against the demands of the legislature?

[12] Let us sift the material before us, and see whether there will be great likelihood of failure of the respondent's case by collating all the factors:

i. want of *bona fide* action:

   a. the Definitive Agreement under consideration in the suit has no leg to stand on as the scheme has collapsed in its entirety; and

   b. the dismissed suit of D8-22-981-2005 was identical with the current suit; and

ii. the respondent has no *locus standi* to file the suit let alone on behalf of anyone.

[13] With every respect to the learned judge, the view held by him seemed to have totally missed the point as promulgated in s. 351 of the Companies Act 1965. This provision reads:

351. Security for costs

(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[14] As legislated above, a defendant in certain cases may ask for an order to compel the plaintiff to give security for costs of the action, but subject to the preconditions of the above provision. How the discretion is applied by the presiding judge very much depends on the material before him. From precedents, security for costs may be prayed for, eg, as mentioned earlier, where the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal in the country or for some good reasons (see *Kevorkian v. Burney (No. 2)* [1937] 4 All ER 468). It will be very costly and debilitating to expect the successful defendant to go to the plaintiff's country merely to recoup his costs there. Imagine his consternation if after successfully tracking the plaintiff he discovers that the latter is without any asset.

[15] Under British law under s. 447 of the Companies Act 1948, which is in *pari materia* with s. 351 of the Malaysian Companies Act 1965, where "the sole plaintiff is a limited company and its financial condition brings it within s. 447, the court has the discretionary power to order it to give security for costs" (*Pearson and Another v. Naydler and Others* [1977] 3 All ER 531; *Odgers on Pleading and Practice* by G.F Harwood p. 266). Section 447 reads as follows:

Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until security is given.

[16] In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273 Lord Denning MR had succinctly said:

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> If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances ...

B Lawton LJ further approved:

> I agree with Lord Denning MR that the effect of s. 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs
C of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case.

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[17] Bottom-line, by virtue of s. 351, the court here statutorily may entertain the application if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence.
E Nothing is mentioned of the weaknesses of the plaintiff's case. The application of discretion, if security for costs is to be granted, therefore is subject to credible testimony i.e. the source of the reason that the plaintiff will be unable to pay the costs of a successful defendant (*Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432).
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[18] It is quite clear from all the above authorities that the concept of likelihood of winning has no place at all in an application for security for costs before a judge. The prerequisite
G is that there is credible testimony before the judge and that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence. The discretion ought not to be hampered by any new formulated concepts that tend to import inhibitive demands into
H s. 351 of the Companies Act 1965.

[19] We now briefly sift the evidence and conclude whether there is reason to believe that the respondent will be unable to pay the appellants in the event of their success.

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[20] The learned judge had openly admitted that the respondent was a company that did not carry a large asset. He fell short of admitting that the respondent, a dormant RM2 company, was impecunious. In fact currently this shell company which has no business address and without any assets suffers liabilities of up to RM3,401. Apart from this appeal where the panel had ordered costs, we were not unmindful of the earlier High Court orders dismissing the respondent's application with costs for interlocutory injunctions against the appellants on 21 September 2005. From the records and submission of the appellants two other interlocutory applications were also made by the respondent and eventually dismissed with costs. And all this without taking into account the costs from the impending full blown trial and any probable follow up appeals.

[21] It was our finding that the respondent would certainly fail to pay up if costs were ordered against it. We also found that the learned judge had failed to consider the relevant factors which were irrebuttable of its inability to pay the appellants in the event of the suit's dismissal. Unless security for costs were ordered against the respondent the stifling oppression would shift to the appellants. Based on the above reasons we had allowed the appeal with costs and thereupon set aside the High Court order. The deposit was ordered to be refunded to the appellants. The senior assistant registrar's order was reinstated but varied to RM40,000 with this sum to be deposited into court one month before the full trial.